

(24)

Office - Supreme Court, U. S.
FILED
APR 7 1943
STATES ELMORE COOPER
CLERK

SUPREME COURT OF THE UNITED

OCTOBER TERM, 1942

Nos. 893-894

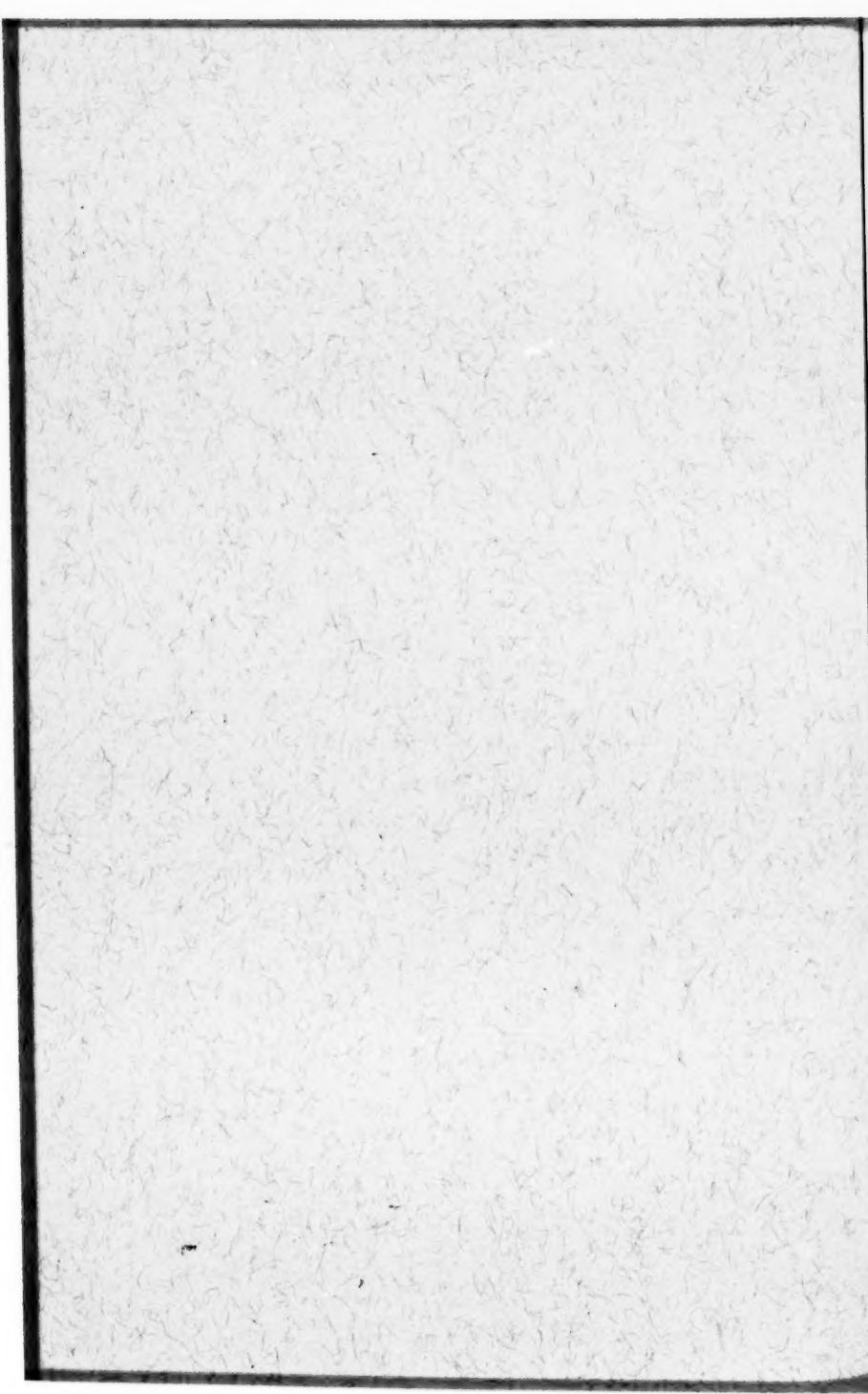
GEORGE E. EDDY AND SAMUEL SILBIGER,
Petitioners,

vs.

CHARLES H. KELBY AND CLIFFORD S. KELSEY,
TRUSTEES OF THE DEBTOR, PRUDENCE BONDS CORPO-
RATION (NEW CORPORATION), RECONSTRUCTION
FINANCE CORPORATION, ET AL.

PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.

SAMUEL SILBIGER,
Counsel for Petitioners.



INDEX.

SUBJECT INDEX.

	Page
Petition for writs of certiorari	1
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement	4
Specification of errors	9
Reasons for granting the writs	10
Brief in support of petition	12
Point I. The appeal to the Circuit Court was properly taken as of right	12
II. The reorganization trustees had no interest in the trust estates involved in the accountings; therefore, any award to them and their counsel, chargeable to the trust funds, is, as matter of law, beyond the power and jurisdiction of the court and is indefensible	17
III. Assuming section 250 of the bankruptcy act is applicable in the case at bar, the Circuit Court abused its discretion in denying petitioners' application for an allowance of an appeal	19
Conclusion	20
Appendix	21

TABLE OF CASES CITED.

<i>Bell v. Roberts</i> , 112 F. (2d) 585	13
<i>Berl v. Crutcher</i> , 60 F. (2d) 440	14
<i>Camden Rail & Harbor Terminal Corp.</i> , 35 Fed. Supp. 862	13
<i>Central Hanover Bank & Trust Co. v. Bank of Manhattan</i> , 105 F. (2d) 130	5
<i>Central R. R. Co. v. Pettus</i> , 113 U. S. 116	10, 18
<i>Cumberland Glass Co. v. DeWitt</i> , 237 U. S. 407	13

	Page
<i>Dickinson v. Cowen</i> , 309 U. S. 382.....	12, 17
<i>Gillespie, In re</i> , 190 Fed. 88.....	18
<i>Hart v. Goadby</i> , 138 App. Div. 160, 123 N. Y. S. 126..	10, 26
<i>Heinsheimer, In re</i> , 214 N. Y. 361.....	16
<i>Mallow Hotel Corporation</i> , 29 Fed. Supp. 931.....	13
<i>Manufacturer's Trust Co. v. Kelby</i> , 125 F. (2d) 650..	8, 15, 18
<i>Nassau Smelting & Refining Works v. Brightwood Bronze Foundry Co.</i> , 265 U. S. 269, 44 Sup. Ct. 506, 68 L. Ed. 1013.....	14
<i>Smith v. First National Bank of Albany</i> , 103 Misc. 274, 170 N. Y. S. 127.....	16
<i>Sprague v. Ticonic Bank</i> , 307 U. S. 161.....	16
<i>Trustees v. Greenough</i> , 105 U. S. 527.....	10, 18, 19

STATUTES CITED.

Bankruptcy Act, Section 25(a).....	4
Bankruptcy Act, Section 70(i).....	14
Bankruptcy Act, Sec. 77B (Art. XIII, Chap. X of the Chandler Act).....	2, 12
Judicial Code, Sec. 240(a).....	2
Judicial Code, Sec. 250.....	4, 15

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

Nos. 893-894

IN THE MATTER OF

PRUDENCE-BONDS CORPORATION,

Debtor,

IN THE MATTER OF

THE JUDICIAL SETTLEMENT OF THE ACCOUNTS OF PROCEEDINGS
OF CITY BANK FARMERS TRUST COMPANY, ETC.

GEORGE E. EDDY AND SAMUEL SILBIGER,

Petitioners,

vs.

CHARLES H. KELBY AND CLIFFORD S. KELSEY,
TRUSTEES OF THE DEBTOR, PRUDENCE BONDS CORPORATION (NEW CORPORATION), RECONSTRUCTION FINANCE CORPORATION, JOSEPH NEMEROV, GEORGE C. WILDERMUTH AND CHARLES H. KELBY.

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

To the Honorable, The Supreme Court of the United States:

George E. Eddy and Samuel Silbiger pray that writs of certiorari issue to review the two orders (R. 92, 118) of the United States Circuit Court of Appeals for the Second

Circuit, made in the above-entitled matter, respectively, on January 7, 1943, and March 2, 1943, by the first of which orders their petition to said Court for the allowance of an appeal from an order (R. 104) of the District Court for the Eastern District of New York was denied; and by the second of which the appeal (R. 108) from said order of the District Court, taken by petitioners and others, as of right, was dismissed on motion (R. 118).

Opinions Below.

The Circuit Court of Appeals rendered no opinions on the motions for the allowance of the appeal or on the motions to dismiss the appeal taken as of right.

Jurisdiction.

The order denying leave to appeal was entered in the Circuit Court of Appeals on January 10, 1943; the order dismissing the appeal was entered March 2nd, 1943.

The jurisdiction of the Court to review the decisions of the Circuit Court of Appeals is invoked under Section 240(a) of the Judicial Code, as amended by Act of Congress of February 13, 1925 (U. S. Code, Title 28, Section 347).

Questions Presented.

1. Where, in a corporate reorganization proceeding under Sec. 77B of the Bankruptcy Act (Art. XIII, Chap. X of the Chandler Act), the bankruptcy *res* in the actual or constructive possession of the Bankruptcy Court, consisted of eighteen trust funds, each securing the debtor's bonds issued under eighteen separate substantially similar trust agreements with various corporate trustees, the eighteen separate plans of reorganization and the general plan of reorganization approved and confirmed by the Court (after the debtor had been adjudged insolvent and eliminated from any right or interest in such trust funds), provided

(a) for the creation of a new corporation to succeed to the rights of the debtor, the bondholders receiving voting trust certificates representing the entire capital stock thereof; (b) the bonds be modified; (c) the various corporate trustees were removed from office and a substitute trustee appointed under modified trust agreements, and (d) the corporate trustees had transferred and delivered the respective trust funds to the substitute trustees; (e) the trustees of the debtor in reorganization had, pursuant to the orders of the Court, surrendered, transferred and assigned to the new corporation all their right, title and interest in the respective trust funds—and thereafter the respective removed corporate trustees filed in the District Court accounts of their proceedings under the respective original trust agreements and prayed for a judicial settlement thereof; are such accounting proceedings a part of the “reorganization proceedings” and the new corporation or the trustees of the debtor who have no beneficial interest in the respective trust funds necessary or proper parties, and have they any standing to appear and object to such trustees’ accounts?

2. Are such accounting proceedings independent of and collateral to the bankruptcy reorganization proceeding?

3. Was the Federal Court required to and did it apply the New York State law governing the substantive rights of the bondholders and counsel representing the bondholders?

4. Has the District Court, on a summary application, the power to award compensation for services payable out of the fund, to volunteers who have no interest in and no right to a share in the fund realized from such litigation? or to the attorney for such volunteers?

5. Is the procedure on appeal from the awards of compensation for services rendered in the proceedings for the

judicial settlement of the accounts of the removed corporate trustees governed and regulated by Section 250 of the Bankruptcy Act, by Section 25(a) of the Bankruptcy Act, or by the Judicial Code and the Federal Rules of Civil Procedure?

Statement

The debtor filed its petition for reorganization under Section 77B of the Bankruptcy Act on June 29, 1934, and respondents Charles H. Kelby and Clifford S. Kelsey were appointed trustees and duly qualified and acted as such (R. 2). An order adjudging the debtor to be insolvent was entered April 27, 1937 (R. 2). The amended plans of reorganization of the eighteen corporate bond issues of the debtor and the amended general plan of reorganization were approved and confirmed on January 18, 1938 (R. 3).

The separate plans each provided for a modification of the bonds, the removal of the corporate trustee and the appointment of a substitute trustee under a modified trust agreement, and the general plan provided for the creation of a new corporation with the same name as debtor (hereinafter referred to as the New Corporation) to succeed to the rights of the debtor and perform the servicing of the collateral security underlying the eighteen series of bonds (R. 3).

By orders of April 27, 1938, and June 6, 1938, the form of supplemental trust agreements was approved and their execution authorized; the effective date of this plan was fixed as of March 1, 1938; the selection of the City Bank Farmers Trust Company as substituted trustee under the respective eighteen trust indentures was confirmed; the deposed corporate trustees were directed to and did transfer and convey the respective trust funds to the substituted trustee; and the debtor's trustees, respondents Charles H. Kelby and Clifford S. Kelsey were directed to and did trans-

fer and assign to the New Corporation all their right, title and interest in and to the underlying collateral securing the eighteen bond issues (R. 3-4).

By the orders confirming the separate plans and the general plan of reorganization and said orders of April 27, 1938, and June 6, 1938, the District Court reserved jurisdiction to carry out and consummate the plans (R. 2-3).

After the deposed trustees transferred the various trust funds to the substituted trustee pursuant to the plans and after the Bankruptcy Court surrendered whatever actual or constructive possession or control it had of the trust funds by the transfer of all the rights, title and interest of the debtor's trustees to the new corporation, accountings were filed by the deposed corporate trustees in August and September, 1938, of their acts and proceedings under the respective trust indentures, and they prayed that such accounts be judicially settled (R. 4).

The jurisdiction of the District Court to judicially settle said accounts was challenged and the District Court held it was without jurisdiction over the acts and proceedings of the corporate trustees occurring prior to June 29, 1934, the date the debtor's petition for reorganization was filed (R. 4).

Petitioner George E. Eddy, represented by petitioner Samuel Silbiger, appealed to the Circuit Court of Appeals from said decision; the New Corporation and two of the corporate trustees likewise appealed. The debtor's trustees did not appeal, and neither they nor their counsel, respondent George C. Wildermuth, took any part in establishing the complete jurisdiction of the District Court over said accounts (R. 4, 114). The Circuit Court of Appeals reversed the District Court (R. 4, 114) (*Central Hanover Bank & Trust Co., et al. v. Bank of Manhattan Co., et al.*, 105 F. (2d) 130), and the District Court thereupon assumed complete jurisdiction and extended the time of the bond-

holders, and the New Corporation and/or the debtor's trustees to file objections to said accounts to October 2, 1939 (R. 4).

Objections to such accounts were duly filed by petitioner George E. Eddy and other bondholders, represented by the petitioner Samuel Silbiger; by certain bondholders, represented by respondent Joseph Nemerov; by the respondent, the New Corporation, represented by Charles M. McCarty, Esq., and by respondents Charles H. Kelby and Clifford S. Kelsey, Trustees of the Debtor, represented by the respondent George C. Wildermuth. All such objections were filed on behalf of the objectors and all bondholders, in the respective bond issues to which the objections related (R. 5). No objections to the accounts were filed by the Reconstruction Finance Corporation nor was it a bondholder, nor had it intervened in the accounting proceedings (R. 117).

Among the accounts so filed were five by City Bank Farmers Trust Company, as Trustee of Prudence Bonds Series A. A., Third, Fourth, Seventh and Seventeenth. Trial of the issues raised by all the accounts and exceptions and objections thereto were referred to a Special Master to hear and report thereon (R. 5).

The status of the debtor's trustees and the New Corporation as proper or necessary parties to the accounting proceedings was first challenged by petitioners George E. Eddy and Samuel Silbiger by a motion for declaratory judgment returnable April 1, 1940; the motion was argued and briefed, but before decision thereon, it was agreed between petitioner Samuel Silbiger and respondent George C. Wildermuth that all future steps in the accounting proceedings should be determined by conference of counsel for all objectors; that the tactics, strategy and procedure should be analyzed and agreed upon by all such counsel;

that but one attorney, Mr. Wildermuth, should be the examining or trial attorney, and that all testimony to be presented in support of the objections to the accounts should be offered on behalf of all the objectors and thereupon petitioners consented to and withdrew the motion for a declaratory judgment as to the status of the several objectors (R. 5-6). No agreement was entered into as to the right of counsel to compensation, or as to the allocation of any allowances for services in the event of a successful termination of the litigations (R. 90).

Protracted hearings were had and the trial of said five accountings extended from April, 1940 to June, 1942. It is undisputed that the factual data upon which all the objectors relied to support their objections were discovered by the New Corporation and their accountants (R. 73); that most of the clerical work throughout the proceedings was performed by the New Corporation and its counsel; that the necessary legal documents and briefs were drafted by counsel for the New Corporation (R. 19), and submitted to petitioner Samuel Silbiger, and respondents George C. Wildermuth and Joseph Nemerov for suggestions, amendments and editing, and after Mr. Wildermuth entered the armed service of our country, to respondent Charles H. Kelby in his stead (R. 76). The services of the New Corporation were not duplicated by the petitioner Samuel Silbiger—or by the respondents Kelby, Wildermuth and Nemerov. The services of said petitioner and said respondents were of the same general character and consisted of attending conferences, exploring the legal aspects of all phases of the questions to be considered, determining the tactics to be pursued, the character of the evidence to be introduced, the method of proof and competency of the evidence, the problems to be faced and how met, and independent research and analysis of the cases to be relied on

and discussed in the various briefs, and attendance and participation in the actual trial of the issues.

In the rendition of such services petitioner Silbiger, and the respondents Wildermuth, later superseded by respondent Kelby, and the respondent Nemerov, devoted substantially the same time, effort, and ability (R. 6).

Pending the trial of said five accountings, the accounting trustee of Prudence Bonds 12th Series, moved to dismiss all objections filed therein, on the ground that (1) the objectors had no status to file their objections, and (2) that the objections were barred by the six-year statute of limitations. This motion was denied and an appeal taken by the corporate trustee and affirmed by the Circuit Court of Appeals (*Manufacturer's Trust Company v. Kelby, et al*, 125 F. (2nd) 650). In said case the Circuit Court did not resolve the question which of the objectors—the bondholders, the debtor's trustees, or the New Corporation had a standing to object (R. 9). When this Court denied certiorari, (316 U. S. 697, 86 L. E. 1156), City Bank Farmers Trust Company made active overtures for a settlement of the litigation of its five accounting proceedings and the negotiations resulted in a compromise approved by the District Court, whereby there was realized for the trust funds an aggregate amount of \$783,500.

Thereafter, applications were made to the District Court for allowances for services in connection with the creation of said fund, payable out of the funds realized, and the Court awarded to respondents Charles H. Kelby, Trustee of Debtor, as requested.....\$22,635.00

Clifford S. Kelsey, Trustee of Debtor,
(he requested \$1,000).....\$ 500.00

George C. Wildermuth, attorney for Debtor's

Trustees, (he requested \$37,725.00)..... 32,500.00

Joseph Nemerov, Attorney for Bondholders,

(he requested \$49,500.00)..... 8,000.00

To the petitioner, Samuel Silbiger, Attorney for
 bondholders, (he requested \$42,566.67) 6,000.00
 And to the New Corporation for disbursements
 (R. 8, 117) 29,195.94
 The order was entered December 10, 1942 (R. 104).

No objections were filed by any bondholder to petitioner Silbiger's application. No objections were filed by any one to the application of Charles H. Kelby. The applications of petitioner Samuel Silbiger and the respondents George C. Wildermuth, Joseph Nemerov and Clifford S. Kelsey were opposed by the New Corporation and the Reconstruction Finance Corporation.

Prior to February, 1939, allowances for services in the Reorganization Proceeding proper had been made to respondents Charles H. Kelby and Clifford S. Kelsey, Trustees of the Debtor, of \$122,500.00; to their attorney, respondent George C. Wildermuth, \$130,000.00 and to petitioner Samuel Silbiger, \$5,000.00 (R. 110).

Notice of application by petitioners for leave to appeal was duly served on December 11, 1942 (R. 1), and such leave was denied on January 7, 1943 (R. 10, 92). Notice of appeal, as of right was duly served within forty days from the entry of said order, on January 15, 1943 (R. 108). The Circuit Court, on motion, dismissed said appeal because of lack of jurisdiction (R. 118).

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that it was without jurisdiction to entertain petitioner's appeal taken as a right.

2. The Circuit Court of Appeals erred in refusing to grant leave to appeal, if an appeal did not lie as of right.

Reasons for Granting the Writ.

By refusing to allow petitioners to appeal, and by the dismissal of their appeal taken as of right, the Circuit Court has denied petitioners a review on the merits of the order of the District Court whereby trust funds equitably belonging to petitioner Eddy and other bondholders, to the extent of \$55,625.00, have been summarily taken from them and distributed to strangers, who have no interest in such trust funds.

The decision of the District Court in awarding allowances to parties who had no interest in the funds realized, is probably in conflict with the applicable law of New York State (Sec. 475 of the Judiciary Law), and the important principles of law established by this Court in *Trustees v. Greenough*, 105 U. S. 527; *Central R. R. Co. v. Pettus*, 113 U. S., 116.

The denial to petitioners of a review of the decision of the District Court presents an important question of Federal Law and Procedure, which has not been and should be settled by this Court.

The decision sought to be reviewed, so far as it involves the question of the status of the parties to file objections to the corporate trustees' accounts, is in conflict with applicable decisions of the courts of New York State. *Hart v. Goadby*, 138 App. Div. 160; 123 N. Y. S. 126.

The final determination by this Court of the questions involved is important, inasmuch as ten other accounting proceedings, collateral to the reorganization proceedings of Prudence Bond Corporation, are pending and undetermined in the District Court, and a decision by this Court will finally set at rest the controversial question, who are the proper parties and have the responsibility and the right to conduct and shape further proceedings below.

Wherefore, your petitioners respectfully request that a Writ of Certiorari should be granted as prayed.

Dated: April 5, 1943.

GEORGE E. EDDY,
SAMUEL SILBIGER,
Petitioners.

STATE OF NEW YORK,
County of Kings, ss.:

George E. Eddy and Samuel Silbiger, petitioners herein, each being duly sworn, says that he has read and knows the contents of the within petition and the same are true in all respects as he verily believes.

GEORGE E. EDDY,
SAMUEL SILBIGER.

Sworn to before me this 5th day of April, 1943.

RUTH GOODMAN,
Notary Public, Kings County.

Kings Co. Clk's No. 645, Reg. No. 251-G-5. Queens Co. Clks. No. 1599, Reg. No. 129-G-5. Nassau County Clerk's No. 13-G-45. Commission Expires March 30, 1945.